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No. 00-814

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

CITY OF LONG BEACH,

Petitioner

v.

SEUNG CHUN LIM, FLUFFY, INC. a California corporation, and 5436 SANTA MONICA BOULEVARD, INC., a California corporation,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

# RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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## I OPPOSITION TO PETITION

Respondents oppose the granting of certiorari.

## II STATEMENT OF THE CASE

The City of Long Beach is located south of the City of Los Angeles and is within the County of Los Angeles. It is approximately 50 square miles in size and in 1997 (the year of the trial) had a population in excess of 452,283 persons.

Beginning in 1977 the City of Long Beach (hereinafter "the City") has attempted to prohibit adult bookstores and adult theaters from operating within its boundaries (Appendix C, p. 26a). See generally Walnut Properties, Inc. v. City Council, 100 Cal.App.3d 1018; 161 Cal.Rptr. 411 (1980) and People v. Superior Court (Lucero), 49 Cal.3d 14; 259 Cal.Rptr. 740; 774 P.2d 769 (1989). By 1988 only 12 adult businesses remained in the City (Exh. 205). The City's goal of having no adult businesses has been carried out by various ordinances which theoretically allow some adult businesses but which, as a practical matter, make it extremely difficult for such businesses to operate.

In November of 1994 the City adopted the most recent adult zoning ordinance, the one which is the subject of the current litigation. The November 1994 ordinance ("the ordinance") required all existing adult bookstores and theaters to relocate because none complied with the drastic locational requirements of the ordinance. Respondents are essentially three human beings who have owned and

operated four adult businesses in the City for many years. Respondent Seung Chun Lim's stores are located at 1529 West Pacific Coast Highway ("Pacific World") and 6037-39 Atlantic Avenue ("T & C World"). Respondent Robert Blake is 80 years old and operates his adult bookstore (South Seas Adult Bookstore) at 1567 West Pacific Coast Highway through his corporation, Fluffy, Inc., which is the official respondent herein. Likewise, Larry Spahr, an elderly gentleman, operates the Front Door Adult Theater and Bookstore at 5832-34 North Atlantic Boulevard through his corporation known as 5436 Santa Monica Boulevard, Inc..

These three men were forced to move by the ordinance even though nothing was really available to them as a practical matter. All three attempted to testify at the trial in this case. Mr. Lim, whose primary language is Korean, tried to testify in English. His testimony was stricken because the District Judge could not understand him. Blake and Spahr did testify. All three were given 1 ½ years to relocate their businesses. They sued for injunctive relief because they contended the City had no right to force existing adult businesses to relocate when the City did not require non-adult businesses that were not in the proper zones (known as "non-conforming uses" in the language of municipal land use or zoning law) to move. In other words, the City was discriminating against adult businesses by allowing other non-conforming businesses to remain indefinitely. In addition, Respondents contended there were not sufficient available alternative locations in the City where adult businesses could lawfully operate.

At the trial the District Court rejected their First

Amendment/Equal Protection contention. In addition, the District Court rejected their second contention - unavailability of sufficient alternative locations - by placing the burden of proving the existence of such sufficient alternative locations upon Respondents.

Finally, the District Court ruled that properties identified by the City were "available" even though they were occupied by other businesses.

Examples of properties the District Court ruled were available for Respondents for relocation purposes were lumberyards, truck storage centers, the Naval Hospital, Danny's Auto Painting and Collision Center, a veterinary clinic, a dry cleaning and laundry equipment facility, an industrial valve and supply business, an auto/truck towing service, a scrap metal storage yard, a building materials and construction hardware business, a welding equipment shop, a gas station equipment rental business, and numerous multi-tenant professional business office buildings. Essentially, the District Court ruled that Mr. Blake, then 78 years old, could be required by the City to move his retail store to a lumberyard or auto/truck towing service. The District Court expressly ruled that it was "immaterial" that the properties which were zoned for adult uses were " . . . occupied and unavailable. . . ." (Appendix C, p. 65a). The District Court explained in footnote 6 that it was "immaterial" that sites were owner-occupied, subject to leases, or not available (Appendix C, p.61a).

The District Court concluded that given the requirements of the ordinance, including the requirement that no adult business could be within 1000 feet of another adult

business, in theory 27 adult businesses could operate simultaneously in the City. Accordingly, the District Court, acknowledging the existence of Respondents' four adult businesses and a fifth one which was not a party to the litigation, ruled the ordinance to be constitutional as applied. It therefore dissolved the preliminary injunction which it had previously issued pursuant to stipulation and then stayed the order for 20 days to give Respondents the opportunity to appeal and obtain a stay from the Ninth Circuit Court of Appeals, which granted the stay pending appeal (Circuit Judges Thompson and Leavy).

On June 20, 2000 the Ninth Circuit decided Young v. City of Simi Valley, 216 F.3d 807 (9th Circuit 2000), also an adult zoning case. On June 27, 2000 the Ninth Circuit decided Diamond v. City of Taft, 215 F.3d 1052 (9th Cir. 2000), also an adult zoning case. On June 27, 2000 the Ninth Circuit decided the instant case, Lim v. City of Long Beach, 217 F.3d. 1050 (9th Circuit 2000). Finally, on July 27, 2000, the Ninth Circuit decided Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000), still another adult zoning case. All four of these cases are now pending before this Court:

(1) Diamond v. City of Taft, No. 608
(2) City of Simi Valley v. Young, No. 701
(3) City of Los Angeles v. Alameda Books, No. 799
(4) City of Long Beach v. Lim, No. 814

The Ninth Circuit in the instant case correctly held that in adult zoning cases the burden of proof is on the City to justify the adult zoning ordinance (Appendix A, p.6a). The Ninth Circuit also correctly ruled that in relocation

adult zoning cases property encumbered by long term leases are not part of the relevant real estate market within the meaning of City of Renton v. Playtime Theaters, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). The Ninth Circuit did not reach the issue of sufficiency of alternative sites. The City is seeking certiorari on these three issues.

Finally, the Ninth Circuit upheld the District Court's ruling that the First and Fourteenth Amendments (free speech/equal protection) are not violated by a City's requirement that non-conforming adult businesses relocate, but that non-conforming non adult businesses may remain and continue to "violate" recently adopted zoning ordinances. Respondents contend that the enactment and retroactive enforcement of adult zoning ordinances violate the First Amendment because they deter the opening of new adult businesses in proper zones. Prospective adult business owners fear that they will be forced to shut down shortly after opening. On these points Respondents are filing a cross petition for writ of certiorari.

## III REASONS FOR DENYING CERTIORARI

### A. Question No. 1: Burden of Proof

The Ninth Circuit below held that in adult zoning cases the burden of proof as to the existence of alternative sites for the relocation of adult businesses is on the City. In this respect the Ninth Circuit reversed the District Court. The decision of the Ninth Circuit was consistent with related cases decided by this Court and also with the en banc decision of the Third Circuit in Phillips v. Borough of Keyport, 107 F.3d 164, 177 (3rd Cir. 1997) (expressly

holding that in a challenge to the constitutionality of an adult zoning ordinance the burden of proof is on cities to prove affirmatively the existence of a sufficient number of constitutionally available locations for adult businesses to allow ample alternative locations for such businesses). This Court denied certiorari. See Phillips v. Borough of Keyport, ___ U.S. ___, 118 S.Ct. 336, 139 L.Ed.2d 261 (1997).

This Court has repeatedly placed the burden of proof on the government to justify restrictions on free speech. In Schad v. Borough of Mt. Ephraim, 452 U.S 61, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981), the Court imposed upon the Borough of Mount Ephraim the need to justify enactment of a zoning restriction which precluded nude dancing and any other form of live entertainment.

> "[T]he onus of demonstrating that no less intrusive means will adequately protect the . . . state interest and that the challenged statute is sufficiently narrowly drawn, is upon the party seeking to justify the burden [upon expression]." 452 U.S. at 69 n.7 (emphasis added).

Thereafter, the Schad Court repeatedly found the ordinance defective **due to the city's failure of proof**.

Similarly, in City of Cincinnati v. Discovery

Network, Inc., 507 U.S. 410, 113 S.Ct. 1505, 123 L.Ed.2d 99 (1993), the Court, in rejecting the City's claim that its commercial news rack ban was a content-neutral time, place, and manner restriction, stated that "[i]t is the absence of a neutral justification for [the] ban . . . that prevents the city from defending its news rack policy as content-neutral." 507 U.S. at 429-30, 113 S.Ct. at 1517.

In Boos v. Barry, 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed. 2d 333 (1988) the Court rejected the notion that the District Court of Columbia's ban on carrying signs critical of foreign governments in front of foreign embassies was a "content-neutral" restriction after noting that the government had failed to justify it on that basis:

> "Respondents and the United States do not point to the 'secondary effects' of picket signs in front of embassies. They do not point to congestion, to interference with ingress or egress, to visual clutter, or to the need to protect the security of embassies." 485 U.S. at 321, 108 S.Ct. 1164.

Finally, in Erznoznik v. City of Jacksonville, 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125 (1975), the Court held that an ordinance prohibiting showing of films containing nudity by a drive-in theater was not a content-neutral ordinance because the city "offers no [content-neutral] justification" and that [a]bsent such a justification,

the ordinance cannot be salvaged." 422 U.S. at 215, 95 S.Ct. at 2268.

In all these cases, the Court looked very closely at the challenged law or ordinance to see if it was indeed a content-neutral time, place and manner restriction and in all of these cases, the burden was placed upon the enacting governmental entity to demonstrate that the ordinances in fact met all applicable constitutional tests.

Even in the area of the less protected commercial speech, the Court has consistently imposed a strong burden of justification on the governmental entity which establishes the challenged regulation. See e.g., Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20, 103 S.Ct. 2875, 2882 n.20, 77 L.Ed.2d 469 (1983) ("[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it); accord Edenfield v. Fane, 507 U.S. 761, 770-71, 113 S.Ct. 1792, 1800 123 L.Ed.2d 543 (1993); 44 Liquormart, Inc.v. Rhode Island, 571 U.S. __, __, 116 S.Ct. 1495, 1509, 115, 134 L.Ed.2d 711 (1996) and Rubin v. Coors Brewing Co., 514 U.S. _ , __, 115 S.Ct. 1585, 1592, 131 2d 532 (1995).

Schad made clear that the burden is on the City not only to justify the need for its ordinance, but also to demonstrate that the ordinance provides ample alternative avenues of communication. The Court unmistakably imposed upon the Borough of Mount Ephraim the burden of showing that its ordinance allowed ample alternative avenues of communication. 452 U.S. at 76-77, 101 S.Ct. at 2186-87. The Borough attempted to discharge that burden by pointing to the existence of other adult businesses in

nearby communities not within the jurisdiction of the Borough. Id. The Court concluded that the presence of such businesses in nearby communities was legally irrelevant and, as a result, the Borough had failed to meet is burden of showing that the ordinance provided ample alternative avenues of communication.Id.

Moreover, Ladue v. Gilleo, 512 U.S. 43, 114 S.CT. 2038, 129 L.Ed.2d 36 (1994), reaffirmed the ruling of Schad that it is the governmental entity enacting a speech restriction which bears the burden of proof in justifying it as a mere regulation of the "time, place, or manner" of speech and, in particular, in showing that it leaves open ample alternative channels for communication. Specifically, Ladue, involved a challenge to an ordinance which prohibited all persons, including homeowners, from posting signs in residential neighborhoods (including on their own property) except for certain express categories of signs. By virtue of the exceptions in the ordinance, the Court of Appeals had concluded that the ordinance was an impermissible content-based restriction on speech.

The Supreme Court affirmed the judgment of the Court of Appeals but went out of its way to address the city's secondary contention that the ordinance could survive constitutional scrutiny if analyzed as a "mere regulation of the 'time, place, or manner' of speech." 512 U.S. at __, 114 S.Ct. at 2046. In responding to that argument, the Court made it clear that the City had the burden to persuade the Court that the ordinance left open ample alternative channels for communication;

"Ladue contends, however,

> that its ordinance is a mere regulation of the 'time, place or manner' of speech.... However, even regulations that do not foreclose an entire medium of expression, but merely shift the time, place or manner of its use, must 'leave open ample alternative channels for communication.' In this case, we are not persuaded [by the city's assertion] that adequate substitutes exist for the important medium of speech that Ladue has closed off." 512 U.S. at _, 114 S.Ct. at 2046 (emphasis added) (internal citation omitted).

By stating, "we are not persuaded that adequate substitutes exist," the Court in Ladue made clear that the burden was on the city to so persuade it. Again, Ladue did not establish new law but was simply another case consistent with a long lime of Supreme Court decisions imposing upon the governmental entities enacting speech restrictions the burden of proving that they can be justified as reasonable time, place, and manner restrictions.

Respondents do concede that the Fifth Circuit in Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1990) suggested, with no analysis, that the plaintiff adult businesses had the burden of proof. The Fifth Circuit

assumed that the burden of proof was upon the plaintiffs apparently just because they were plaintiffs. It was this case upon which the District Court below relied for its conclusion that plaintiffs here had the burden of proof. The District Court also relied upon BBI Enterprises, Inc. v. City of Chicago, 874 F.Supp. 890 (N.D. Ill 1995) and T-Marc, Inc. v. Pinellas County, 804 F. Supp. 1500 (M.D. Fla. 1992), but neither of these District Court decisions is persuasive. Aside from the constitutional view point, as a practical matter the burden should be on the positive side, not negative side. How does one prove a negative - that no alternative sites exist. The city is in the best position to establish the existence of alternative locations. Presumably cities do studies when adopting these kinds of ordinances. Cities must have maps and other data, such as business license information, readily available to them to establish the existence of properties.

Given the express holding of the en banc Third Circuit, which the District Court below ignored, given the logic of not requiring one to prove a negative, and considering prior, related decisions of this Court, the "circuit split" between the Ninth Circuit's decision and the Fifth Circuit's decision in Woodall v. City of El Paso, supra is not significant to warrant review by this Court.

If this Court does grant certiorari on this question, Respondents will ask this Court to reject that portion of the Ninth Circuit's burden of proof ruling that states,

> ". . . [W]here a city has provided a good faith and reasonable list of potentially

> available properties, it is for the plaintiffs to show that, in fact, certain sites would not reasonably become available. . . . The burden of showing that particular sites would not reasonably become available rests with the plaintiffs." Appendix B, p. 21a).

The quotation above weakens the holding of the Ninth Circuit on the burden of proof issue and seems to place some of the burden on the adult business, not the city. To this extent the Ninth Circuit erred. This subsidiary burden of proof issue is fairly included within Question No. 1. This Court would have jurisdiction under Rule 14.1(a) to consider the question of whether the Ninth Circuit erred in limiting the scope of the burden of proof it placed upon cities. See Ohio v. Robinette, 519 U.S. 33, 38, 136 L.Ed.2d 347, 117 S.Ct. 417, 420 (1996) and Vance v. Terrazas, 444 U.S. 252, 258-259, n. 5, 62 L.Ed.2d 461, 100 S.Ct. 540, 544-545, n. 5 (1980).

In summary Respondents oppose the granting of certiorari on Question No. 1, but if certiorari is granted the issues to be resolved should include who has the burden of showing that particular sites would or would not reasonably become available. The entire burden should be on the cities.

**B. Question No. 2: Long Term Leases**

The Ninth Circuit correctly reversed the District

Court on the question of whether property encumbered by long term leases are available for adult businesses. Petitioner has referred to no circuit split on this issue. Petitioner implies, but does not expressly state, that the Fifth Circuit's decision in Woodall v. City of El Paso, 49 F.3d 1120 (5th Cir. 1995) somehow conflicts with the decision of the Ninth Circuit below. This, however, is not true. To understand the Fifth Circuit's decision in the 1995 decision inWoodall v. City of El Paso one should look at its prior decision in Woodall v. City of El Paso, 950 F.2d 255 (5th Cir. 1992). In the earlier case, the Fifth Circuit stated, Woodall v. City of El Paso, 950 F.2d 255 at 262:

> "Appellants also complain that some property is currently in use. Renton responds, in part, to this contention. The fact that a business is operated on a particular parcel of property does not necessarily take the property out of the market place where adult businesses must fend for themselves. If, however, a business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise. Such a

> leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions."

The passage quoted above certainly indicates that the Fifth Circuit believed that the property devoted to another use under a term of years would not be available for a relocation site for an adult business. The Fifth Circuit correctly noted in its Woodall opinion that this Court in City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 89 L.Ed.2d 29, 106 S.Ct. 925 (1986) only responded "in part" to this contention.

The Ninth Circuit, in an earlier case involving adult zoning, Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1531 (9th Cir. 1993), cert.den. 511 U.S. 1030 (1994), referred to this language specifically. The Ninth Circuit in the Topnaga Press case quoted from the following portion of the Fifth Circuit's language from the Woodall case:

> "[When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any other business enterprise." (Emphasis added).

Following the quote, the Ninth Circuit expressly stated,

> ". . . We need not determine whether the Fifth Circuit is correct. . . ."

Accordingly, the decision below by the Ninth Circuit is not inconsistent with its earlier decision in Topanga Press, Inc. v. City of Los Angeles, supra. The decision below clearly is not in conflict with the Woodall decision to which reference was made by the Ninth Circuit in its Topanga Press case.

The decision below does not conflict with the later decision of the Fifth Circuit in Woodall v. City of El Paso. The Fifth Circuit stated in the more recent Woodall v. City of El Paso case,

> "The Adult Businesses complained that some sites had existing structures that were unsuitable for any small retail business. In many cases these were large multi - tenant office - warehouse buildings, and the uncontroverted evidence was that the retail businesses could and occasionally did locate in such buildings. A few sites were occupied by rather large single use

building [sic] like a warehouse or factory, which could arguably be outside the commercial real estate market. The Adult Businesses also complained that some sites lacked adequate parking to meet the City's requirements of retail businesses, but made no attempt to show that any site's parking problem could not be cured at a reasonable cost. The Adult Businesses had other similar complaints about other sites. However, even if we agreed that these sites suffered from effects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable.

... In almost every case, if the suggested site proved physically or legally unavailable, there was another site next door or

> across the street that was also potentially available." Woodall v. City of El Paso, 49 F.3d at 1126. (Emphasis added)

It is clear from footnote 4 of Woodall v. City of El Paso, 49 F.3d at 1125-1126 (5th Cir. 1995), that there is no split between the Fifth Circuit and the Ninth Circuit's decision below. The Fifth Circuit stated,

> " . . . The record is devoid of evidence that any site was subject to a long term lease, much less one with such terms as would take it out of the commercial real estate market."

The Fifth Circuit did not hold that property encumbered by long term leases could be considered part of the relevant real estate market. The court did not focus on "long term" leases. Thus, there is no circuit split on this issue.

Having shown that there is no circuit split on the issue of what is part of the relevant market, we now turn to this Court's decision in City of Renton v. Playtime Theaters, supra, a case upon which Petitioner relies to demonstrate an alleged conflict between the decision of the Ninth Circuit below and this Court's decision in City of Renton v. Playtime Theaters, Inc.. This Court's prior decision in City of Renton v. Playtime Theaters is not on

point because that case involved an attempt by an adult business to enter the market for the first time. It did not involve a case such as the instant one where existing adult businesses were being forced to relocate by a later adopted ordinance. In the City of Renton v. Playtime Theaters case arguably it is the risk of the market place that the prospective adult business assumes when trying to enter the market. In other words, if the prospective adult business operator waited too long for a city to develop it is not the fault of the city that property which would otherwise have been available for adult uses became encumbered by long term leases. The prospective adult business operator simply could have come to the city earlier.

What the Petitioner fails to understand is that a new entry case is far different from a relocation case. When a city attempts to order or compel an existing adult business to relocate it should make sure that there are properties that are available, not tied up with long term leases. It is just not realistic to believe that if the only properties theoretically available under the zoning code of a particular city are tied up under long term leases that the properties are nevertheless available to the adult businesses which are being compelled to relocate. We cannot ignore reality nor we can ignore common sense. The cities know this. That is why cities play games with the Constitution, hoping that some court will be ignorant of the reality - that it is impractical to force an existing adult business to relocate when the only relocation site consists of an office building with long term professional tenants such as doctors or dentists. Would this Court in Young v. American Mini Theaters, 427 U.S. 50, 49 L.Ed.2d 310, 96 S.Ct. 2440 (1976) have upheld the Detroit ordinance in question if it

required existing adult businesses to relocate to the General Motors plant. Would that have been realistic? Would any court uphold the constitutionality of such an ordinance?

Accordingly, this Court should decline certiorari with respect to Question No. 2. However, if it does grant certiorari with respect to Question No. 2, it should explore further that portion of the Ninth Circuit's decision purporting to uphold the contention that properties with restrictive covenants prohibiting adult businesses from being operated are nevertheless "available" for adult businesses. If property encumbered by a long term lease is not available, and it is not, as the Ninth Circuit correctly ruled, likewise properties encumbered by covenants prohibiting their being used by adult businesses should likewise be considered unavailable with respect to relocation cases. Whether or not they should also be considered unavailable for new entry cases is not relevant to this inquiry. Again, as with Question No. 1, if this Court should grant certiorari with respect to Question No. 2 the issue of restrictive covenants is fairly included within Question No. 2 with respect to long term leases.

## C. Question No. 3: Sufficiency Of Alternative Sites

There is no circuit split on the issue of sufficiency of alternative sites in terms of their numbers. Certiorari should be denied on this point.

The instant case involves the forced relocation of at least five existing adult businesses. Respondents conceded in the trial court that there were eight properties that were theoretically available in that they were vacant and met the

zoning requirements. However, there was no indication that the owners of those properties would rent to Respondents. It is simply not sufficient from a real estate market perspective to believe that an adult business only needs one site to which it can relocate. There must be some opportunity to shop around for potential sites in terms of their suitability physically as well as economically.

Would Petitioner City of Long Beach contend that an adult ordinance requiring the only adult bookstore in town to move was constitutional if there was only one property available under the zoning code? What if the owner of that one parcel of property refused to sell or rent to the only adult bookstore for whatever reason - political pressure or otherwise. Clearly to have a viable choice the adult bookstore must have more than one property from which to select in order to make the relocation viable. Clearly the adult bookstore being compelled to relocate should not be at the mercy of one owner who may or may not choose to sell or rent to that particular business. While the failure or refusal to sell or to rent by the particular property owner would not be a constitutional violation still the City in terms of its zoning code must make available more than one property for the one adult business. There must be some choices available otherwise the relocation is realistically almost impossible.

In Young v. American Mimi Theaters, supra, this Court stated with respect to the issue of the number of possible locations for adult businesses:

> "The situation would be quite different if the ordinance had

> the effect of suppressing, or greatly restricting access to, lawful speech. Here, however, the District Court specifically found that '[t]he Ordinances do not affect the operation of existing establishments but only location of new ones. There are myriad locations in the City of Detroit which must be over 1,000 feet from existing regulated establishments. This burden on First Amendment rights is slight." Young v. American Mini Theaters, Inc., 427 U.S. 50, at 71-72, n35, 96 S.Ct. 21440, 2453 n35, 49 L.Ed.2d 310 (1976).

Existing adult businesses should not be forced to scramble for scraps of properties in inappropriate locations. We have come a long way from this Court's decision in Young v. American Mini Theaters, Inc.. It is time to stop the trend. In any event, Question No. 3 is not worthy of this Court's review. Indeed, the Ninth Circuit below expressed no opinion as to this particular issue and therefore this issue is not properly subject to certiorari review.

## IV CONCLUSION

For the foregoing reasons, Respondents respectfully ask this Honorable Court to deny certiorari.

Respectfully submitted,

ROGER JON DIAMOND

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